UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STAN LEE,

Plaintiff,

-against-

MARVEL ENTERPRISES, INC. and
MARVEL CHARACTERS, INC.,

Defendants.

No. 02 CV 8945 (RWS)

PLAINTIFF STAN LEE'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF NON-PARTY STAN LEE MEDIA, INC. FOR AN ORDER SUBSTITUTING SLMI AS PLAINTIFF IN THIS ACTION, VACATING THE COURT'S 2005 ORDERS, AND GRANTING SLMI LEAVE TO FILE AN AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff, Stan Lee ("Lee"), submits this memorandum of law in opposition to the motion of non-party Stan Lee Media, Inc. ("SLMI") for an order vacating the Court's 2005 orders that resolved the parties' summary judgment motions and dismissed the action with prejudice, substituting SLMI for Lee as plaintiff, and granting SLMI leave to file an Amended Complaint relating back to the inception of this action.

Through its motion, SLMI seeks to resuscitate and take over this long-closed action, which was filed in 2002 and settled in 2005, and to assert completely new and different claims from those that plaintiff Lee originally brought and then settled. In this action, Lee and defendant Marvel Entertainment, Inc. ("Marvel") litigated a dispute over Lee's entitlement to share in certain contractually defined profits from the exploitation of motion pictures and television shows, pursuant an agreement between Lee and Marvel. In April 2005, Lee and Marvel amicably resolved their differences and the Court entered a so-ordered stipulation dismissing the action with prejudice. SLMI played no role in this action, even though the action was a matter of public record and was well publicized at the time. That was to be expected, because SLMI has, and has shown, no interest in the outcome of the dispute between Lee and Marvel concerning these revenues, and until July 2010, had never before claimed one.

Beginning early in 2007, SLMI and certain individuals purporting to represent it (led by a three-time convicted felon who is currently serving a 10-year prison term for having manipulated the value of SLMI stock) have brought a series of lawsuits in multiple forums seeking to assert claims on SLMI's behalf against Lee and Marvel. The predicate for these claims is the contention that SLMI, rather than Marvel, owned the intellectual property rights to certain comic-book characters created or co-created by Lee during his decades of work at Marvel, under an agreement entered into between an alleged predecessor to SLMI and Lee (the "SLE/Lee Employment Agreement").

Importantly, SLMI's claims **have already been considered and rejected** by this Court in an action entitled *Abadin v. Marvel Entertainment, Inc.*, 09 CV 715 (PAC), a derivative action that was brought on SLMI's behalf by a group of shareholders including José Abadin and Nelson Thall, two of the three individuals now claiming to constitute SLMI's board of directors. Judge Crotty concluded in dismissing *Abadin* that all of SLMI's claims were barred by, *inter alia*, the statutes of limitations and the doctrine of laches. Judge Crotty further ruled that "**it [was] now time to call a halt**" to the parade of litigation that SLMI and persons claiming to represent it have brought against Lee and Marvel in New York, California, and elsewhere and "**to bring this matter to a close.**"

Now, through its present motion, long after this action was voluntarily dismissed with prejudice, SLMI seeks (i) to reopen this action, which was settled and closed more than five years ago, (ii) to vacate at least two orders of this Court, including the judgment of dismissal with prejudice, (iii) to oust Lee as the plaintiff **in his own action** and to substitute SLMI as the plaintiff, (iv) to file an Amended Complaint realigning Lee from being the plaintiff to being a defendant, (v) through its Amended Complaint, to misuse this action as a vehicle for relitigating claims that were already brought on behalf of SLMI and dismissed by Judge Crotty, and (vi) to have the claims SLMI asserts in its proposed Amended Complaint deemed to "relate back" more than eight years to the inception of the action in 2002, even though in almost every respect, SLMI's proposed Amended Complaint seeks to assert completely new and different claims from those asserted in the complaint that Lee originally filed in 2002 and that the parties settled in 2005.

SLMI's motion is a preposterous one that distorts the Federal Rules of Civil Procedure on which it relies virtually beyond recognition. Defendant Marvel is filing today a memorandum of law setting forth the numerous reasons that SLMI's motion should be denied in all respects. In the interest of avoiding duplication, Lee joins in Marvel's memorandum in its entirety and adopts its contents. In this separate memorandum, Lee will briefly summarize and supplement some of the most important grounds warranting denial of SLMI's motion, and set forth why Lee should be awarded costs and attorneys' fees payable by SLMI's counsel pursuant to 28 U.S.C. § 1927.

FACTS

Marvel's memorandum of law contains a detailed statement of facts in which Lee joins. The most relevant facts are discussed below.

A. The Parties

Plaintiff Stan Lee is a veteran comic-book writer and editor who created or co-created many of America's best-known comic-book characters. For decades, Lee was employed by Marvel and its predecessors. In 1998, after Marvel terminated Lee's prior employment agreement, Lee began to work for a new company, the alleged predecessor to SLMI. The SLE/Lee Employment Agreement, however, recognized that Lee would be spending 10 to 15 hours per week working for Marvel pursuant to an agreement between Lee and Marvel. (*See* Affidavit of Steven J. Shore, Esq. ("Shore Aff."), Ex. "A")

Lee's tenure at SLMI was brief. In January 2001, Lee terminated the SLE/Lee Employment Agreement based on SLMI's material breaches, including SLMI's failure to pay his salary. (Shore Aff. Ex. "B") Soon thereafter, SLMI filed for bankruptcy and ceased operating. (Shore Aff. Ex. "C") It has since been dissolved under Colorado law. SLMI's bankruptcy case was closed in 2006 without any plan of reorganization having been confirmed. (Shore Aff. Ex. "D")

Around the time that SLMI stopped operating, its co-founder, Peter F. Paul, fled to Brazil. *See United States v. Paul*, 326 F. Supp. 2d 382, 387 (E.D.N.Y. 2004). It was soon revealed that Paul had engaged in a pervasive fraud, as a result of which he was indicted and pleaded guilty to a felony charge of federal securities fraud that caused millions of dollars in losses. (Shore Aff. Ex. "E" and "F") In June 2009, Judge Wexler of the Eastern District sentenced Paul to ten years in federal prison for his fraud against SLMI's shareholders. (Shore Aff. Ex. "G") In July 2010, the Second Circuit dismissed Paul's appeal from his conviction, leaving just two narrow sentencing issues to be resolved on his criminal appeal. (Shore Aff. Ex. "H")

B. The Extensive Prior Litigation on SLMI's Behalf in this Court

Despite Paul's unlawful conduct and his felony conviction for manipulating trading in SLMI's stock, he and a group of individuals led by him have initiated a series of lawsuits against Lee and Marvel. SLMI's attempts to participate in this action are the most recent.

1. *Stan Lee Media, Inc. v. Marvel Entertainment, Inc.*

On March 15, 2007, SLMI commenced an action against (only) Marvel in this Court entitled *Stan Lee Media, Inc. v. Marvel Entertainment, Inc.*, 07 Civ. 2238 (PAC). At the heart of SLMI's Complaint in this action was its allegation that in the SLE/Lee Employment Agreement, Lee supposedly assigned to SLMI the rights to iconic Marvel characters such as Spider-Man, The Fantastic Four, The Incredible Hulk, X-Men, Daredevil, Silver Surfer, Iron Man, and others. SLMI was represented by King & Spalding LLC. The action was assigned to Judge Crotty. (Shore Aff. Ex. "I")

Marvel moved to dismiss the Complaint on the ground that SLMI had been dissolved and had no board of directors empowered to pursue litigation. One of Paul's closest friends, Christopher Belland, then caused a board election to be held, and three directors were elected. Thereafter, discovery proceeded between SLMI and Marvel (including Marvel's production to SLMI of all the documents that SLMI is seeking to unseal in its other pending motion to intervene, as attested in Marvel's papers on that motion, rendering that motion moot). However, on June 27, 2008, a Colorado court granted a motion to remove three members of SLMI's board of directors based on Lee's motion accusing them of "fraudulent or dishonest conduct" and "gross abuse of authority." (Shore Aff. Ex. "J") That order, which was not appealed, left SLMI without a board of directors once again. Meanwhile, SLMI's counsel obtained leave to withdraw and SLMI failed to engage a successor. On September 9, 2008, Judge Crotty dismissed SLMI's action against Marvel without prejudice. (Shore Aff. Ex. "K")

2. *Abadin v. Marvel Entertainment, Inc.*

On January 26, 2009, four alleged shareholders of SLMI – José Abadin, Nelson Thall, John Petrovitz, and Christopher Belland – filed a shareholder derivative suit in this Court on behalf of SLMI. The defendants were Marvel and several of its affiliates and officers, Lee and Lee's wife and daughter, and Arthur M. Lieberman (Lee's attorney). This action was also assigned to Judge Crotty. The *Abadin* plaintiffs were initially represented by a new attorney, Martin Garbus, Esq. (initially as a sole practitioner and later as an attorney affiliated with Eaton & Van Winkle LLP). (Shore Aff. Ex. "L")

In April 2009, plaintiffs filed an Amended Complaint. At this time, Thall and Petrovitz were dropped as plaintiffs without explanation, leaving Abadin and Belland as the named representatives of SLMI's shareholders. Several defendants, such as Lee's wife and daughter, were also dropped. (*See* moving Affirmation of Luke A. McGrath ("McGrath Aff."), Ex. "K")

The claims by the *Abadin* plaintiffs on SLMI's behalf, like those asserted in SLMI's action in 2007, were all founded upon the allegation that pursuant to the SLE/Lee Employment Agreement, SLMI owns the intellectual property rights to dozens of Marvel comic-book characters that Lee created or co-created. Based on this central allegation, plaintiffs asserted eight claims for relief including trademark and copyright infringement, breach of fiduciary duty, and breach of contract. Defendants moved to dismiss all claims. While the motions to dismiss were being briefed, SLMI sought to conduct discovery, but Judge Crotty ordered that no discovery take place until he had ruled on the motions to dismiss. (Shore Aff. Ex. "M")

In August 2009, Mr. Garbus and his firm moved to withdraw as counsel. They were succeeded by Chadbourne & Parke, LLP and Michael Hess, Esq., who purported to file a Second Amended Complaint. Judge Crotty held that plaintiffs were not entitled to amend their complaint again and he denied them leave to do so, although he did receive the document as part of plaintiffs' opposition to defendants' motions to dismiss. (Shore Aff. Ex. "N"; McGrath Aff. Ex. "L")

On March 31, 2010, Judge Crotty issued an order reiterating his denial of plaintiffs' request for leave to file the Second Amended Complaint and granting Lee's and Marvel's motions to dismiss the Amended Complaint. (Shore Aff. Ex. "O") With respect to the request for leave to further amend, Judge Crotty stated:

> The Court recognizes that leave [to amend] should be "freely" given, but only "when justice so requires." Here, allowing leave to replead, would work a manifest injustice.
>
> The transaction [underlying Abadin's claims] is now more than a decade old. Plaintiffs have been attempting to initiate the proceeding in this Court now for more than three years; in Colorado Supreme Court for more than half a decade; for three years in the U.S. District Court for the Central District of California; and in a bankruptcy proceeding involving SLMI, which began in February, 2001 and continued to December, 2006. There has also been class action litigation in the Central District of California involving these same parties,

> as well as a settlement thereof. Moreover, one of the princip[al] instigators of litigation involving SLMI is a convicted felon who manipulated SLMI's stock. Finally, the proposed amended pleading is the fourth such pleading dealing with SLMI's allegations against Marvel and Lee here in the Southern District....
>
> * * *
>
> **Given the pleading history here in this District, the Colorado State Court proceedings, the three companion actions in the Central District of California, the class action suit and settlement, and a 5 year bankruptcy case, it is now time to call a halt.**

(Id. at 6-8 (emphasis added; footnote omitted))

Judge Crotty then turned to the merits of the plaintiffs' claims. He began his analysis by holding that the named derivative shareholders were not SLMI shareholders at the time of the relevant underlying events and therefore lacked standing to sue derivatively under Fed. R. Civ. P. 23.1 and Colorado law. (Id. at 9-10) He also noted that insofar as plaintiffs were asserting claims against Lee, such claims were previously released by all SLMI shareholders in the 2002 settlement of a federal securities class action. (Id. at 10-11)

Judge Crotty then proceeded, in additional holdings on the merits, to dismiss each of plaintiffs' eight claims for relief in the Amended Complaint on grounds specific to each claim, in addition to the common grounds of lack of standing and release. Specifically:

- Count I of the Complaint asserted a claim for copyright infringement, based on the allegation that Lee had assigned his ownership of comic-book characters to SLMI in the SLE/Lee Employment Agreement of 1998. The Court held, *inter alia*, that SLMI's copyright claim was-time barred and was barred under the doctrines of laches and estoppel. In reaching this conclusion, Judge Crotty observed that Lee had repudiated the SLE/Lee Employment Agreement in January 2001 and that any objection SLMI might assert to the termination was long since time-barred. He also found that "Lee has been using his own characters since at least 1999. Plaintiffs cannot wait a decade to enforce their rights." (Id. at 11)

- Count II asserted a Lanham Act claim against Lee and Marvel. This too was dismissed as time-barred, because defendants' alleged violations of SLMI's rights had continued, openly and notoriously, since October or November 1998 and the applicable statute of limitations is six years. (Id. at 12)

- Count III asserted that Lee had breached the SLE/Lee Employment Agreement. The statute of limitations on this claim began to run in January 2001, when Lee gave notice that he was terminating the agreement, and had expired long before this action was filed in 2009. (Id.)

- Count IV asserted a tortious interference claim against Marvel and Lieberman. The Court dismissed this claim as insufficiently pleaded and implausible, as well as time-barred. (Id. at 12-13)

- Count V asserted a claim for breach of fiduciary duty. This claim was dismissed as being improperly duplicative of plaintiffs' other claims, internally inconsistent, and time-barred. (Id. at 13)

- Count VI asserted a claim for aiding and abetting breach of fiduciary duty against Marvel and Lieberman. Its "allegations [were] wholly conclusory", implausible, and insufficient. The three-year statute of limitations had long since expired. (Id. at 13-14)

- Counts VII and VIII sought to impose a constructive trust and require an accounting. Because all the substantive counts were being dismissed for various reasons including the statutes of limitations, there was no basis for granting either of these remedies. (Id. at 14)

Significantly, with respect to all claims, the Court rejected plaintiffs' contention that the applicable statutes of limitations should be tolled, observing that plaintiffs were seeking "to obliterate the statute of limitations." (Id. at 11 n.5) In this regard, Judge Crotty further observed:

> As all of the Complaints make clear ..., Lee's and Marvel's alleged conduct was neither secret nor clandestine, but rather open and notorious.... There is no reason to toll the statute of limitations on any of the Counts asserted in the Complaint. Further, there is every reason to apply the doctrine[s] of laches and estoppel to Plaintiffs' claims; they have waited too long and it is now time to bring this matter to a close. (Id.)

The *Abadin* plaintiffs have appealed the dismissal of their action to the Court of Appeals, where their brief on appeal is due on September 10, 2010. (Shore Aff. Ex. "P")

C. The Extensive Prior Litigation on SLMI's Behalf in Other Courts

In addition to the two prior actions in this Court, persons purportedly acting on behalf of SLMI, and affiliated with Paul, Abadin, Belland, and their associates, have filed a host of litigations in other courts, including the U.S. District Court for the Central District of California, as well as the state courts of Colorado. Much of this litigation has been duplicative of the actions filed in this Court. The attorneys for the SLMI group in California have included Sean P. Sheppard, Esq. and Jack Cairl, Esq., as well as Mr. Garbus admitted *pro hac vice*; in Colorado, the succession of lawyers has included Ducker, Montgomery, Aronstein & Bess, P.C. and Kamlet Reichert, LLP, as well as Mr. Garbus and others. (Shore Aff. Ex. "Q")

In April 2009, Abadin filed a second federal derivative suit against Lee in the Central District of California, captioned *Abadin v. Lee*. (Shore Aff. Ex. "R") Abadin filed this action even though his first derivative suit against Lee and others was then pending before Judge Crotty, and in it he duplicatively re-asserted many of the very same claims that he was simultaneously pursuing against Lee before Judge Crotty. Abadin eventually agreed to stay his duplicative California suit. Another duplicative action, *SLMI v. Lee*, also brought in the Central District of California, has also been stayed by order of Judge Wilson. (Shore Aff. Ex. "S") Still further litigation was necessitated in Colorado by the fraudulent and abusive behavior of the three SLMI directors elected in 2008, whose gross misconduct brought about their almost immediate removal by the Colorado District Court. In all, there have been at least seven separate lawyers or law firms who have represented SLMI and the Paul/Abadin/Thall/Belland group in the various civil matters in New York, California, and Colorado.

D. This Action Between Lee and Marvel

The action in which SLMI has filed this motion – *Lee v. Marvel* – was filed, litigated, settled, and dismissed long before any of the litigation described above had commenced by SLMI or the persons associated with it. Lee filed his Complaint against Marvel on November 12, 2002. (McGrath Aff. Ex. "A") In his Complaint, Lee asserted that Marvel had breached a provision of a 1998 agreement between Lee and Marvel (the "Marvel Agreement") under which

Lee was entitled to share in certain contractually defined profits from the exploitation of motion pictures and television shows. After discovery, both parties moved for partial summary judgment. This Court granted each side's motion in part and denied each in part, in a detailed, published opinion that was publicized at the time. *See Lee v. Marvel Enterprises, Inc.*, 386 F. Supp. 2d 235 (S.D.N.Y. 2005). Following the summary judgment decision, the parties agreed to a settlement. A stipulation and order of dismissal with prejudice was submitted by the parties, signed by the Court on April 22, 2005, and entered on April 27, 2005. (Shore Aff. Ex. "T")

It is now 12 years after the Marvel Agreement was entered into, 8 years after Lee sued on the Marvel Agreement, and 5 years after the case was settled, all of which occurred openly and notoriously. Now, SLMI, acting at the direction of Abadin, Thall, Belland, Paul, and their cohorts, demands that Lee turn over his proceeds under the agreement. Even apart from the fact that Judge Crotty has already held that such a claim may not be asserted on SLMI's behalf against Lee, there could not be a clearer case for application of laches and estoppel.

ARGUMENT

I

SLMI'S CLAIMS ARE BARRED BY *RES JUDICATA*

The doctrine of *res judicata* or claim preclusion bars a party from relitigating a claim that it has already had the opportunity to litigate. *Res judicata* bars relitigation not only of issues that were actually litigated in a prior action, but also of issues that **could or should have been litigated** in the prior action. *See, e.g., Rivet v. Regions Bank*, 522 U.S. 470 (1998).

Here, the essence of SLMI's claim in the proposed Amended Complaint – that SLMI owns the rights to certain comic-book characters pursuant to the SLE/Lee Employment Agreement – is the same central allegation underlying all the claims filed on SLMI's behalf in

Abadin. All the allegations and claims contained in the proposed Amended Complaint either were asserted in *Abadin* or, at a minimum, could have been asserted in that case. Judge Crotty's decision dismissing these claims as barred by the statutes of limitations, the doctrine of laches, and other grounds is *res judicata* and bars SLMI's effort to interpose the same claims here.

That the claims asserted in *Abadin* and those that SLMI seeks to assert herein are substantially similar is demonstrated by comparing the two complaints' key allegations, as reflected in the chart below:

***Abadin* First Amended Complaint**	**SLMI's Proposed Amended Complaint**
¶ 24 – This is an action against all defendants regarding certain property of SLM, including (but not limited to) assets, claims, copyright and trademark claims and rights, and other intellectual property rights and interests, including a right, title and interest to the use of the name and trademark "Marvel" and the likeness, name and image of Stan Lee. . .	¶ 1 – This is an action to declare the rights of [SLMI] pursuant to a written agreement between SLMI and Stan Lee dated October 20, 1998 assigning all of Stan Lee's intellectual property rights in copyrighted works to SLMI, together with Stan Lee's rights of publicity. . .
¶ 49 – On or about October 15, 1998, Lee entered into an agreement with Stan Lee Entertainment, Inc., the predecessor in to SLM, concerning both his employment and his assignment, then and in the future, of his "Property" and "Rights", as such terms are described and defined therein.	¶ 9 – On October 20, 1998, Stan Lee executed an "Employment Agreement/Rights Assignment" with Stan Lee Entertainment, Inc. (the October 1998 Assignment").
¶ 50 – [quoting paragraphs 4(a) and 4(c) of agreement]	¶ 11 – [quoting paragraph 4 of the agreement]
¶ 43 – [listing 76 separate characters allegedly created and owned by Stan Lee] ¶ 51 – Lee had retained his rights and interests in all his characters, which were encompassed	¶ 12 – Upon information and belief, the Property and Rights transferred in paragraph 4 of the October 1998 Assignment included all characters and comic book texts authored by Stan Lee, including such characters as Spider-

within the Property and Rights and other interests of Lee that were assigned to Stan Lee Entertainment Inc. in the Lee-SLM Agreement.	Man, Daredevil, X-Men and The Incredible Hulk, together with the characters on the list annexed hereto as Exhibit "B". [List is comprised of 74 of the 76 characters listed in ¶ 43 of the *Abadin* Amended Complaint.]
¶ 65 – On or about November 17, 1998, Lee, in exchange for present and future consideration, and Marvel executed an agreement that purported to convey to Marvel the very "Property" and "Rights" that the Lee-SLM Agreement transferred to Stan Lee Entertainment, Inc.	¶ 14 – On November 17, 1998, Stan Lee executed an assignment of his intellectual property rights to defendants Marvel Enterprises, Inc. and Marvel Characters, Inc. ("the November 1998 Assignment").
¶ 67 – Upon information and belief, thereafter, Marvel paid monies to Lee that rightfully belonged to SLM and its shareholders and Lee used his fiduciary control position as Chairman and major shareholder of SLM to conceal from SLM the nature and extent of his breaches of fiduciary duty of care and loyalty.	¶ 23 – Upon information and belief, Marvel executed the November 17, 1998 Assignment and kept its terms secret to induce Lee to breach his fiduciary obligations to SLMI and to divert funds and property belonging to SLMI.
¶ 169 – Based upon the totality of his actions, Lee has breached his fiduciary duty as a director and officer of SLM, and he was induced, aided and abetted to so breach his fiduciary duty by virtue of the wrongful, knowing and intentional actions, participation and substantial assistance of Marvel and Lieberman.	¶ 39 – Defendant Stan Lee had a fiduciary duty to SLMI as its Chairman and as one of its officers at all times after October 15, 1998. Despite his fiduciary duties, Stan Lee failed to turn over property and funds belonging to the corporation that flowed from the exploitation of the Lee Characters and intellectual property that Lee assigned to SLMI in the October 1998 Assignment. ¶ 40 – Defendant Marvel knew of Lee's fiduciary duties to SLMI and of the October 1998 Assignment which assigned Lee's intellectual property rights to SLMI. Notwithstanding this knowledge, Marvel aided Lee in diverting monies and property belonging to SLMI and in enriching both Lee and Marvel with funds and property wrongfully diverted from SLMI.

This comparison reflects that while the newly proposed Amended Complaint at times uses different words from those in the *Abadin* Amended Complaint, the substance of the allegations in the two pleadings is the same. Indeed, in its moving papers, SLMI has acknowledged that the key issue it seeks to litigate here is the same as those brought in the *Abadin* action: "**Simply put, at the heart of this action, as well as the various actions brought on behalf of SLMI ... is the question of who owns Spider-Man and his comrades.**" (SLMI Mem. at 13, citing the *Abadin* Amended Complaint and proposed Second Amended Complaint). Therefore, the new Amended Complaint is barred by *res judicata* and by the underlying dismissal grounds including the statutes of limitations and laches.

The fact that the plaintiffs in the former *Abadin* action were Messrs. Abadin *et al.* suing derivatively on SLMI's behalf, while the substituted plaintiff in this matter would purportedly be SLMI itself acting at Abadin *et al.*'s direction, does not affect the application of *res judicata*. A determination in a shareholder derivative action is *res judicata* in subsequent actions brought by the corporation or other shareholders, including those who were not parties to the prior litigation, so long as the parties' interests were adequately represented in the prior action. *See, e.g., Henik v. Labranche*, 433 F. Supp. 2d 372, 380-82 (S.D.N.Y. 2006) (Sweet, J.) (citing *Dana v. Morgan*, 232 F. 85, 89 (2d Cir. 1916) ("there can be but one adjudication of the rights of the corporation")); *see also Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir. 1987); *Ratner v. Paramount Pictures, Inc.*, 6 F.R.D. 618, 619 (S.D.N.Y. 1942). SLMI is hardly in a position to contend that its interests were inadequately represented in the *Abadin* derivative action given that two of the named plaintiffs in that action, Abadin and Thall, constitute a majority of the three-member board of directors that purports to speak for SLMI today.

Finally, the fact that the *Abadin* plaintiffs have appealed Judge Crotty's dismissal of their action to the Second Circuit does not undercut the *res judicata* effect of his decision. It is well-settled that the pendency of an appeal from a judgment "does not – until and unless reversed – detract from its decisiveness and finality." *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *accord Petrella v. Siegel*, 843 F.2d 87, 90 (2d Cir. 1988).

Because the claim that SLMI seeks to assert is barred by *res judicata*, SLMI's motion seeking leave to be substituted as plaintiff for the purpose of filing it should be denied.

II

SLMI'S CLAIMS ARE BARRED BY THE PROHIBITION AGAINST CLAIM-SPLITTING

SLMI's attempt to sue Lee again in this action is also barred by the prohibition against claim-splitting, that is, asserting related claims in a series of actions rather than in a single action. All the claims SLMI seeks to assert in this action have either been previously dismissed with prejudice in prior litigations or could have brought in the prior actions and thus are barred by the doctrine of *res judicata*. To the extent that SLMI now asserts that the claims in its latest proposed complaint are somehow different from those it previously asserted, such conduct constitutes improper claim splitting by SLMI.

It is well-settled that "a plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories." *Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 110-11 (2d Cir. 2000). "Rather, a party must bring in one action all legal theories arising out of the same transaction or series of transactions." *American Stock Exchange, LLC v. Mopex, Inc.*, 215 F.R.D. 87, 91 (S.D.N.Y. 2002) (citations omitted). In other words:

> A party bound by the first judgment may not avoid the effects of res judicata by repackaging an adjudicated claim in new legal theories to bring a second claim

> when the facts essential to the second claim were present at the time of the adjudicated claim....
>
> The plaintiff cannot avoid res judicata by "splitting" its claims into various suits based on different legal theories. It is enough that the facts essential to the current lawsuit were present when the plaintiff brought [the first action].

John Street Leasehold, LLC v. Capital Mgmt. Resources, L.P., 154 F. Supp. 2d 527, 538-40 (S.D.N.Y. 2001). Similarly here, all the facts that SLMI seeks to plead in its Amended Complaint were matters of public record years ago, including the fact that this *Lee v. Marvel* action was filed in 2002 and resolved in 2005. Certainly, the representatives of SLMI knew or should have known about this *Lee v. Marvel action* while it was pending, and when they brought their prior actions against Marvel and Lee including the *Abadin* derivative suit. To the extent, if any, that SLMI argues that it is seeking to assert claims beyond those previously asserted on its behalf in *Abadin* –which as discussed above it is not – then it would be improperly seeking to bring a successive action on claims that could and should have been brought in *Abadin*.

Strict application of the prohibition against claim-splitting is especially warranted here, where SLMI's representatives have had not just one, but multiple opportunities to seek to assert their claims, in the Southern District of New York and elsewhere. Six months ago, Judge Crotty ruled that SLMI already was not entitled to any more opportunities to file claims against Lee and Marvel and that allowing more pleadings to be filed against them "**would work a manifest injustice**" because it was "**now time to call a halt**" to the litigation and "to bring this matter to a close." (Shore Aff. Ex. "O" at 8, 9, 11 n.5 (emphasis added); *see supra* pp. 6-8) The same rationale that led Judge Crotty to disallow the *Abadin* plaintiffs from filing a Second Amended Complaint applies *a fortiori* here and warrants denial of the application of SLMI (through Abadin and his associates) to file yet another Amended Complaint asserting the already dismissed claims, or variations on those claims, against Marvel and Lee.

III

LEE SHOULD BE AWARDED COSTS AND ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 1927

Finally, it is submitted that the conduct of SLMI's counsel in this case warrants an award of costs and attorneys' fees under 28 U.S.C. § 1927, which provides that "[a]ny attorney ... who ... multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." *See generally Gollomp v. Spitzer*, 568 F.3d 355, 368 (2d Cir. 2009); *Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 363 (S.D.N.Y. 2006); *Brignoli v. Balch, Hardy & Scheinman, Inc.*, No. 86 Civ. 4103 (RWS), 1989 WL 146767 (S.D.N.Y. Dec. 1, 1989) (Sweet, J.) (awarding sanctions against counsel pursuant to Section 1927 and other authority).

In *Pentagen Technologies Int'l Ltd. v. United States*, 172 F. Supp. 2d 464, 473-4 (S.D.N.Y. 2001), the court awarded attorneys' fees under Section 1927 based upon counsel's "vexatious litigation strategy and needless occupation of judicial resources":

> Evidence of plaintiffs' counsel's bad-faith in litigating the instant claim is abundant. Most egregiously, plaintiffs' counsel has engaged in a pattern of litigation designed to evade previous rulings. In Pentagen VI, the court noted that "by filing [the] action, Pentagen ha[d] impermissibly attempted to evade" the dismissal in Pentagen V....
>
> Moreover, the similarity between plaintiffs' claims here and those presented in Pentagen V reflects a continuing intent to evade the rulings of courts in this district. Not only was this litigation frivolous and repetitive, therefore, but it was intentionally so.

Id. The parallels between this case and *Pentagen*, including the filing of an action based upon the same claim that had been dismissed previously, are unfortunately clear.

Lee accepts that sizable awards of attorneys' fees under Section 1927 are reserved for grievous cases. This, however, is such a case. This motion to be substituted as plaintiff in a long-closed action (like SLMI's companion motion to intervene for the purpose of seeking to unseal documents that it already has) is meritless in itself and, when viewed in light of the extensive prior litigation that Judge Crotty thought he was bringing to a halt in *Abadin*, can only be construed as an unnecessary and vexatious multiplication of the proceedings.

Current counsel for Abadin *et al.* are relatively new to this situation, but they knew or should have known of all of the past litigation history and prior court decisions in related matters, and they entered the case with their eyes wide open. The tortured litigation history of this entire matter, culminating in Judge Crotty's opinion of March 31, 2010, is a matter of public record, and the files relating to all the prior litigations relevant to this matter were presumably reviewed by SLMI's counsel as part of any reasonable due diligence prior to the filing of this motion. The fact that SLMI and the individuals affiliated with it have been represented by a parade of different law firms and attorneys in New York and other jurisdictions over the past four years should also have warned incoming counsel that they ought to be especially diligent and make sure they were not pursuing claims that had long since been decided against SLMI or become barred by the statutes of limitations – and that they needed to become thoroughly familiar with the files assembled by their predecessors before seeking to file yet further claims.

Beyond that, on July 19, 2010 Lee's counsel (and Marvel's counsel) sent a letter to Judge Sweet addressing the various deficiencies in SLMI's position. (*See* Shore Aff. Ex. "U") In addition, e-mail exchanges were had between counsel regarding the deficiencies of both of SLMI's motions, and as part of this ongoing correspondence, on August 5, 2010, Lee's counsel sent SLMI's counsel two letters detailing the myriad deficiencies in this motion as well as SLMI's companion motion to intervene and unseal certain documents, with citation to court decisions directly on point demonstrating many of the deficiencies in SLMI's motions and litigation tactics. (Shore Aff. Ex. "V") These letters concluded with the requests that SLMI's counsel withdraw these motions and that he respond to the letters in writing by August 13, 2010. The letters also warned that if counsel failed to withdraw the motions, an award of attorneys' fees under 28 U.S.C. § 1927 would be sought. No responses to these letters were ever received.

Stan Lee is 88 years old. It was already "time to call a halt" to the litigation against him and to "bring this matter to a close," as Judge Crotty aptly put it when he dismissed *Abadin* in March 2010. It surely is well past that time today. No attorney or law firm should feel free any longer to aid and abet Peter Paul, José Abadin, Nelson Thall, and their cronies in their apparently endless effort to embroil Stan Lee in frivolous litigation, to the serious detriment of Mr. Lee's business and creative activities and the overall quality of his life. An award of costs and attorneys' fees pursuant to 28 U.S.C. § 1927 is warranted.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Marvel's memorandum of law, SLMI's motion should be denied in all respects and an award of costs and attorneys' fees should be made in favor of Lee pursuant to 28 U.S.C. § 1927.

Dated: New York, New York
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